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A Critical Study of the Probate System in West Virginia--II*

ROBERT J. RILEY, JR. **

CONSIDERATION OF TRANSFERRING PROBATE JURISDICTION FROM COUNTY COURT

The major criticisms of the West Virginia probate system are based on the qualifications of the members of the county courts, the need for commissioners of accounts, duplication of effort between the county courts and circuit courts, and questions as to whether jurisdiction over certain probate matters lies in the county courts or the circuit courts. The fact that the circuit courts have jurisdiction over certain types of probate matters and the additional fact that appeals from county courts to circuit courts in will contests result in trials *de novo* in the circuit courts, indicate that the West Virginia legislators have been cognizant of the inability of the county courts in probate matters.

The primary question to be considered is whether probate jurisdiction should remain in the county courts or should be transferred to another court more competent to carry out its obligations. If jurisdiction over probate matters is to be taken from the county courts, it should be given to courts whose judges have the qualifications to handle all types of probate matters. Procedures for probate should be simplified and one court should have jurisdiction over all probate matters. The probate courts should be courts of dignity, and should command the respect of the public. There should be no duplication of effort between courts and the system should be as inexpensive to individual estates as possible.

"As far as taking probate jurisdiction from the county court is concerned, the question arises as to what sort of probate court should be established in its place. We must have a court whose judge is a lawyer. It must be capable of handling the large business of the city counties, yet must not be too expensive or inaccessible for the rural districts. It must be always open for

* Part I of this article was presented in the December issue.

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routine matters, yet competent to adjudicate questions of the greatest complexity and difficulty known to the law."¹²⁸

West Virginia consists of a total area of approximately 24,282 square miles. The state is divided into fifty-five counties, each of which has a county seat. The county seat is ordinarily the center of county activity and it is there that the probate records of the county are maintained. The county courts and the circuit courts of the counties hold their sessions at the county seats.

In 1960, West Virginia had a population of 1,860,421. Table 1 shows that fifty-five per cent of the population of West Virginia is centered in ten counties, while the other forty-five per cent is scattered over forty-five counties. Thirty-one counties have a population of less than 25,000 and ten counties have a population of less than 10,000. Kanawha and Cabell Counties are the only counties with populations of more than 100,000.

Charleston in Kanawha County, Huntington in Cabell County, and Wheeling in Ohio County, are the only cities in West Virginia with a population of more than 50,000. There are only fifteen cities in West Virginia with a population of more than 10,000.¹²⁹

TYPES OF PROBATE COURTS IN THE UNITED STATES

In the United States there are generally four different forms of probate courts:

1. Separate courts, but with definitely inferior attributes in the local hierarchy of courts. This type of probate court exists in over one-half of the states, including West Virginia.
2. Courts of general jurisdiction which embody both the trial court and the probate court.
3. Separate probate courts, without the inferior status of those mentioned in the first category, but having a place in the local court systems, more or less coordinate with the courts of general jurisdiction.
4. Courts of chancery.¹³⁰

STANDARDS FOR AN IDEAL PROBATE COURT

The conclusion reached in a study of the organization of the probate courts in the United States was that there are three standards

¹²⁸ Price, *Probate Administration and the County Court*, 27 W. VA. L.Q. 221, 223 (1921).

¹²⁹ WEST VIRGINIA BLUE BOOK 750-51 (Myers 1961).

¹³⁰ SIMES & BASYE, *PROBLEMS IN PROBATE LAW* 467 (1946).

for an ideal probate court:

"First, the probate court should be given a place in the judicial organization fully coordinate with the trial court of general jurisdiction. Historically that has been the course of development in England; and that is the trend in the United States. The nature of the business of the probate court, the fact that it handles estates unlimited in value and character, and that its jurisdiction may well include the specific administration and distribution of both the real and the personal property of the estate, all point to a conclusion that a superior court is needed. If such a court is set up, then appeals with trial *de novo* in the court of general jurisdiction would necessarily be eliminated. The only appeals will be to the appellate courts to which appeals are made in actions at law and suits in equity.

"Second, the probate court should be the same court of general jurisdiction or should be a division of it. This does not mean merely a unification of judges It means a unification of courts. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common law jurisdiction of the court, it can be transferred to another docket of the court or to another division, without beginning the proceeding anew. The question of whether a given matter should be in equity or in probate, will cease to be one in which a slight misstep on the part of the attorney may prejudice an innocent litigant.

"Third, the probate judge, if he is not the judicial officer of the court of general jurisdiction, should have the same qualifications as that judge, with a corresponding tenure and salary. He should be a member of the bar, preferably with experience in practice or on the bench."¹³¹

It was also concluded that "in the interests of efficiency and simplicity of administration that all matters directly connected with the administration of the decedent's estate should be within the probate division of the court."¹³² None of the standards for an ideal probate court as determined by the study exist in West Virginia today.

¹³¹ *Id.* at 482-86.

¹³² *Id.* at 486.

CONSIDERATION OF OTHER TYPES OF PROBATE COURTS
FOR WEST VIRGINIA*Courts of Chancery*

Placing probate jurisdiction in courts of chancery in West Virginia is now an anomalous question. On October 13, 1959, the West Virginia Rules of Civil Procedure for Trial Courts of Record were adopted by the Supreme Court of Appeals to be effective on and after July 1, 1960.¹³³ Included in the rules is the following: "There shall be one form of action to be known as 'civil action'; all procedural distinctions between actions, suits and other judicial proceedings at law or in equity and in the forms of action are abolished."¹³⁴ In effect there has been a merger of law and equity in West Virginia. The court of general jurisdiction is the trial court of record to which the rules apply and therefore the question of whether probate jurisdiction should be in courts of chancery is actually a question of whether probate jurisdiction should be in the courts of general jurisdiction, which are the circuit courts.

Separate Probate Courts

Some attorneys in West Virginia are of the opinion that probate jurisdiction should be placed in separate probate courts in each county, each being coordinate with the circuit courts. They feel that attorneys should serve as probate judges and that all probate matters should be handled in the probate courts. Appeals from such courts would be directly to the supreme court and there would be no trials de novo in will contests as a matter of right.

The argument against establishing a separate probate court in each county in West Virginia is that the populations of many individual counties are not large enough to support such a court. Two counties have only two attorneys (See Appendix 1), so the question naturally arises whether it would be necessary for one of the attorneys to serve as probate judge and for the other attorney to represent all of the estates.

An analysis was made of the population make-up of the individual counties by age groups as of April 1, 1960, and by applying the 1941 Table of Mortality, a determination was made as to the

¹³³ LUGAR & SILVERSTEIN, WEST VIRGINIA RULES OF CIVIL PROCEDURE xii (1960).

¹³⁴ *Id.* at 2.

number of people that are expected to die in a single year in each county. "According to studies made . . . there is approximately one administration for every three deaths."¹³⁵ Table 2 shows the approximate number of people expected to die in a year in each county and also the approximate number of estates of those dying which will be subject to administration. There are fourteen counties which would have less than fifty estates to be administered in a year, thirty-four with less than one hundred, and forty-three with less than one hundred fifty. A probate judge would not be kept busy, if he had only 150 estates a year come under his jurisdiction, because it would be assumed that he would have a clerk or clerks to handle the detailed administrative duties such as receiving claims and sending out notices. Some attorneys argue that the probate judge could serve on a part-time basis and practice law at the same time. Such a system may be workable but there would always be the possibility that the law practice would interfere with the judicial duties and the judge would not have the time to devote to his position as probate judge, as would be required. Also, the salary of the probate judge should be high enough to attract capable attorneys to the position. It is probable that many small counties would not be financially able to support a capable probate judge. Many counties would not be able to pay the probate judge a salary comparable to that paid the circuit court judge and if they did, the probate judge would not be earning his salary in the vast majority of instances. However, the larger counties may be able to support a probate judge and also have enough estates to enable the probate judge to work on a full-time basis.

Courts of General Jurisdiction

West Virginia is divided into twenty-nine judicial circuits, each of which is presided over by one circuit judge, except for the first circuit, which is presided over by two circuit judges. The circuit courts have original and general jurisdiction of all matters at law where the amount in controversy exceeds fifty dollars and of all matters of equity.¹³⁶ The circuit courts must hold a session in each county at least three times a year.¹³⁷ Fourteen of the circuits consist of only one county, while six circuits consist of two counties,

¹³⁵ SIMES & BASYE, *op. cit. supra* note 130, at 557 (as cited in POWELL & LOOKER, *Decedents' Estates*, 30 COLO. L. REV. 919, 922-23 (1930)).

¹³⁶ W. Va. Const. art. VIII, § 12.

¹³⁷ W. Va. Const. art. VIII, § 11.

seven circuits include three counties, and two circuits include four counties. The circuit judges are elected for eight-year terms¹³⁸ and judges are paid 12,500 dollars annually by the state for circuits with a population of less than 100,000, and 14,000 dollars for circuits of 100,000 or more. The circuit judges can receive an additional compensation from the counties, but limited to a total compensation of 18,200 dollars per year. Each county also elects a circuit clerk whose term of office is six years.¹³⁹ The primary duty of the clerk is to maintain and certify the records and orders of the circuit court. The salaries of the circuit clerks range from 1,200 dollars a year in Wirt County to 9,000 dollars in Kanawha County.¹⁴⁰

If probate jurisdiction were taken from the county courts and given to the circuit courts, all of the major criticisms of the West Virginia probate system could be eliminated. Also such a system would correspond with the three standards for an ideal probate system.

By placing probate jurisdiction in the circuit courts, judges with the necessary qualifications would be presiding over probate matters. The circuit judges are attorneys in good standing and the salaries paid them are such as to attract competent men to the positions. They are generally well trained in the law and are attorneys with excellent reputations. They command the respect of the public and would give probate hearings the dignity and attention to which they are entitled. The circuit judges are not primarily politically minded and as long as they perform satisfactorily, they will succeed themselves in office, if they choose to do so.

There would be no question as to which court has jurisdiction over different segments of probate matters. The questions have always been whether jurisdiction lay in the county court or the circuit court. By taking jurisdiction from the county courts, these questions would automatically be eliminated. There would be no concurrent jurisdiction over certain types of probate matters, for jurisdiction over all probate matters would be in the circuit court.

There would be no trials *de novo* over will contests as a matter of right. Contests would be heard by the circuit judge in the first instance. There would be no trials *de novo* on appeals, for appeals would be directly to the supreme court by writ of error.

¹³⁸ W. Va. Const. art VIII, § 10.

¹³⁹ W. Va. Const. art. VIII, § 18.

¹⁴⁰ W. VA. CODE ch. 7, art. 7, § 3 (Michie 1961).

The number of times that contentious issues could be reviewed by different tribunals and arms of tribunals would be cut in half in many instances. All contentious matters would be heard by the circuit judge in the first instance subject to review by the supreme court and no longer would it be necessary to have hearings before a commissioner of accounts, and then the right to additional reviews by the county court, circuit court, and ultimately the supreme court.

There would be no need for commissioners of accounts. Most of the commissioners' work consists of administrative details, such as receiving and approving claims and publishing and mailing notices. Most of this work could easily be performed by clerks of the circuit courts. Settlements could be approved by the circuit judges and when there is any controversy over a claim or any matter of a contentious nature, the proceedings could be heard by the circuit judges in the first instance. The fees charged by the court for supervision during the administration of an estate could be standardized, because the circuit judges and their clerks and deputy clerks are paid a salary and the estates could be assessed for actual costs incurred.

One objection to placing probate jurisdiction in the circuit courts in West Virginia is that the circuit courts are already overburdened with work and that this added burden would increase the backlog of cases that already exists in the courts. There are several answers to this objection. Circuit courts already have jurisdiction over many probate matters such as will construction, suits for determination of heirs, will contests, and suits to sell real estate for the payment of debts. Most attorneys, where there is concurrent jurisdiction over probate matters in the circuit courts and county courts, now use the circuit court because the hearings will be before a qualified judge and because of the right of appeal from the findings of the county court to the circuit court. A great amount of additional work would not be given the circuit judges, for the ministerial duties would be handled by the clerks and only contentious matters, which are the exception and not the rule in the probate of a will and the administration of an estate, would be heard by the judges. Also, the legislature has the authority to rearrange and increase the number of the circuits.¹⁴¹ So, if the circuits are overburdened with

¹⁴¹ W. Va. Const. art. VIII, § 14.

cases because of an expansion of population or because of an expansion of jurisdiction, the situation can be adequately remedied by the legislature. Also the legislature has the right to establish additional courts of limited jurisdiction in any county or city, with the right of appeal to the circuit courts.¹⁴² Therefore, jurisdiction over criminal matters and over domestic relations could be placed in such courts of limited jurisdiction, thereby reducing the number of cases now heard in the circuit courts of many counties.

The other objection to placing probate jurisdiction in the circuit courts is that many of the circuits consist of several counties and that the emergency character of some kinds of probate business may well require a judge in each county. The answer to this is that the circuit clerks can take care of the routine business and the circuit courts must sit in each county. The court would be open for business at all reasonable times, for the circuit clerk's office is always open during business hours. Under the present statutes in West Virginia, when a will is probated in solemn form, it may be necessary to wait until the next term of the county court to hold the hearing which could be three months away. Many of the circuit courts have abolished terms and are in session throughout the year. Therefore the waiting period would only be the normal period required when notice of a hearing is given. Those circuit courts which do hold terms could dispense with terms for probate business, which is the tendency of modern legislation.¹⁴³ A plan for placing probate jurisdiction in the circuit courts was suggested over four decades ago:

"Conferring probate jurisdiction on the general *nisi prius* court . . . is probably the system best adapted to the needs of our state, and certainly the one most approved by present students of judicial organization. This could be adopted in West Virginia by transferring the probate business to the circuit courts, under the supervision and control in the first instance of a permanent commissioner or registrar for probate to be appointed by the circuit judge in each county. This official should have roughly the power now exercised by the county clerk in vacation. He should handle all uncontested routine matters, while contested business would be heard by the circuit judge The commissioner would have also the duties and powers of the present commissioner of ac-

¹⁴² W. Va. Const. art. VIII, § 19.

¹⁴³ SIMES & BASYE, *op. cit. supra* note 130, at 485.

counts and for this work he should have in the larger counties, such assistants or clerks as the volume of the business required. His office would be the probate office of the county He would also keep the records of wills, appraisals and fiduciary settlements now in charge of the county clerk."¹⁴⁴

It would not be necessary to appoint permanent commissioners or registrars for probate, for the circuit clerks could so act. An argument against adding additional duties to the office of circuit clerks is that many of them are already overburdened. However, the circuit clerks may with the consent of the circuit court appoint deputies, who may perform any of the duties and obligations of the clerk.¹⁴⁵ Where necessary, deputies could be appointed to off-set the increase in work caused by the addition of probate jurisdiction in the circuit court.

The advantages of changing probate jurisdiction from the county courts to circuit courts have been recognized by others in West Virginia. In order to effect the change, it would be necessary to make changes in the West Virginia Constitution. Such changes might be brought about in two ways. A majority of the members of the legislature can pass a law calling for a constitutional convention. If passed, the question of a constitutional convention is then submitted to the voters and, if a majority of them are in favor, the convention will be held. All acts and ordinances of the convention must be submitted to the voters for ratification or rejection.¹⁴⁶ "No constitutional convention has been called in West Virginia since the present constitution was adopted in 1872."¹⁴⁷ The other method for amending the constitution is by proposing the amendment to either house of the legislature and, if agreed to by two-thirds of the members of both houses, it is submitted to the voters at the next general election, for ratification or rejection. If a majority of the voters approve the amendment, it will take effect immediately.¹⁴⁸ On November 4, 1930, an amendment which would have vested jurisdiction over probate and kindred matters in circuit courts and would have provided for the appointment of a probate commissioner

¹⁴⁴ Price, *supra* note 128, at 232-33.

¹⁴⁵ W. VA. CODE ch. 6, art. 3, § 1 (Michie 1961).

¹⁴⁶ W. Va. Const. art. XIV, § 1.

¹⁴⁷ Sturm, *Major Constitutional Issues in West Virginia*, BUREAU FOR GOVERNMENT RESEARCH, West Virginia University, PUB. No. 31 136 (1961).

¹⁴⁸ W. Va. Const. art. XIV, § 2.

by each circuit court was rejected by the voters by 173,447 to 50,674.¹⁴⁹

In 1957, the legislature adopted a concurrent resolution creating the West Virginia Commission on Constitutional Revision. The commission was composed of the governor, the president of the senate, and the speaker of the house and forty-five appointive members. From the commission was appointed a subcommittee to study the judiciary. In December, 1960, the commission approved the recommendations of the subcommittee for inclusion in its progress report to the 1961 legislature.¹⁵⁰ Among other things, the commission recommended the transfer or probate and fiduciary matters to the circuit courts.¹⁵¹ Amendments to the constitution giving probate jurisdiction to the circuit courts and taking jurisdiction from the county courts were presented to the House of Delegates of the West Virginia Legislature in the 1962 session. The proposed amendments were referred to the Judiciary Committee of the house but were never acted upon.¹⁵²

RECOMMENDED CHANGES IN THE WEST VIRGINIA PROBATE SYSTEM

The present probate system in West Virginia is largely made up of laws that were passed almost a century ago. Experience has shown that many of the laws are archaic and the time has arrived for the entire system to be up-dated to correspond with modern thinking and practice. Changes in the probate laws are being made piecemeal by the legislature at almost every session. This is required in order to enable out-dated laws to fit into modern practices. The recommended changes will simplify the probate procedures which have been very confusing, because of piecemeal legislation and attempts by the supreme court to modernize the system by court interpretation.

PROBATE JURISDICTION IN CIRCUIT COURTS AND SEPARATE PROBATE COURTS

Probate jurisdiction should be taken from the county courts and placed in the circuit courts. However, it must be recognized that

¹⁴⁹ Sturm, *supra* note 147, at 150.

¹⁵⁰ *Id.* at 20-27.

¹⁵¹ *Id.* at 98.

¹⁵² W. Va. Legislature, JOURNAL OF THE HOUSE OF DELEGATES, 6 (Reg. Sess. 1962).

several large counties have sufficient probate business to have a separate probate court. If probate jurisdiction would be added to the duties of the circuit courts in those counties, it would be necessary to add additional circuit judges. The Constitution of Illinois, adopted in 1870, provided for the creation of separate probate courts in counties with a population of over 50,000. In 1877 this was changed to a population of 100,000 or more, in 1881 it was reduced to counties of 70,000, and in 1933 it was raised to a population of 85,000.¹⁵³ In 1962, counties with a population of over 50,000 were permitted to have separate probate courts; however, the probate judge could include in his activities matters other than probate. The Constitution of West Virginia should be amended to permit the legislature to form probate courts as branches of the circuit court, in counties with a population of more than 85,000, the population requirement being subject to change by the legislature. At the present time the only counties with the necessary populations are Cabell and Kanawha, which include the largest cities in the state, Huntington and Charleston. The approximate number of estates to be administered in the two counties each year is 418 in Cabell and 750 in Kanawha, which should be ample to put the office of probate judge on a full time basis. The probate courts should be given original and general jurisdiction over all probate matters and appeals from their orders should be directly to the supreme court. The office of probate judge should require the same qualifications as are required of a circuit judge and his term of office should also be for eight years. A clerk of the probate branch of the circuit court should be elected and he should be given the right to appoint deputy clerks with the approval of the probate judge. The salary of the probate judge should be high enough to attract good men to the position. In order to attain this, the salary should be commensurate with that paid by the state to circuit judges in circuits having the same population as the county in which the probate judge serves. The salaries of the clerks of the probate courts should approximate the salaries paid the circuit clerks of the same county.

PROBATE PROCEDURE

Probate Of Wills And Appointments Of Personal Representatives

Because of the nature of probate business, the probate court

¹⁵³ BRONSTON, JURISDICTION OF THE PROBATE COURTS OF ILLINOIS, 27-28 (1940).

should be open at all reasonable times. Long delays in the probate of wills and the appointment of personal representatives should be avoided, so that administration can take effect immediately and the estate will not be subject to waste. If a county has a separate probate court as a branch of the circuit court and the judge is on a full-time basis, this will be accomplished. In order to accomplish this in counties in which the circuit court has probate jurisdiction, it is necessary that the circuit clerk be given certain judicial powers.

"In most states clerks of probate courts have been given some judicial powers, or are authorized to exercise judicial powers under special circumstances, as in the absence of the judge, or in non-contentious matters. This is believed justified in the interests of the efficient conduct of the business of the court, provided that general supervision or revision of the acts of the clerk is adequately provided for."¹⁵⁴

Any interested person should be permitted to petition the court for the probate of a will and the appointment of a personal representative of the decedent's estate. In order to protect estates from the possibility of unscrupulous persons attempting to become appointed as the personal representative when the deceased died intestate or the executor named in the will cannot qualify, the present statute in effect in West Virginia should continue to apply, but to both situations. The statute states that when a person dies intestate, administration should be granted to the distributees thereof, preferring first the husband or wife and then such other distributees as the clerk or the court sees fit. If no distributee applies within thirty days, the court or clerk may grant letters to one or more of his creditors, or to any other person.¹⁵⁵ The petition for the probate of a will should include the same information that is required in the petition for probate in solemn form now in effect in West Virginia.¹⁵⁶ No notice should be required on the petition for the probate of a will or on the petition for the appointment of a personal representative,¹⁵⁷ unless an interested person files a demand for notice with the court before the hearing¹⁵⁸ or the court feels that notice should be given.

¹⁵⁴ SIMES & BASYE, *op. cit. supra*, note 130, at 50.

¹⁵⁵ W. VA. CODE ch. 44, art. 1, § 4 (Michie 1961).

¹⁵⁶ W. VA. CODE ch. 41, art. 5, § 5 (Michie 1961).

¹⁵⁷ SIMES & BASYE, *op. cit. supra*, note 130 at 51 (MODEL PROBATE CODE § 14).

¹⁵⁸ *Id.* at 94 (MODEL PROBATE CODE § 66).

When notice is required, it should be given to residents in the same manner as it is given in other suits in West Virginia, that is, by personal service or if the party is not found, then at his usual place of abode by delivery to a member of his family or by posting on his front door.¹⁵⁹ If the interested party is a non-resident, notice should be given in the same manner as personal service to a resident, or by registered mail with a return receipt. At the time the notice is given, a notice should be published in some newspaper circulated in the county where the court is held advising that the will has been offered for probate and/or a petition has been filed for the appointment of a personal representative. The notice by publication should be published for three successive weeks and should also include a notice to creditors to file their claims against the estate. The hearings on the petition should not be held until thirty days from the date of the first publication of notice.

If notice is not required, the court or the clerk of the court should hear the petition for the probate of the will and for the appointment of the personal representative at the time it is presented or at an appointed time thereafter. The court or the clerk, after hearing the petition and finding no objections thereto, should issue an order admitting the will to probate and appointing the personal representative. Immediately after the order is issued, the clerk should be required to give notice to all interested parties stating that the will has been probated and/or the name of the personal representative appointed. The procedure followed for the giving of the notice should be the same as for a notice prior to the probate of a will and/or the appointment of a personal representative, and the published notice should include a notice to creditors to file their claims against the estate.¹⁶⁰

The clerk of the court should be permitted to hear and issue orders on all petitions for the probate of a will and the appointment of a personal representative unless the proceedings are contentious. Thus, if notices are demanded by any party, the hearings on the petition should not be heard by the clerk, but should be heard by the judge. The clerk is under the supervision of the court and all of his actions in probating a will and appointing a personal representative should be reviewed by the court and if confirmed by

¹⁵⁹ W. VA. R.C.P. 4.

¹⁶⁰ SIMES & BASYE, *op. cit. supra*, note 130, at 97 (MODEL PROBATE CODE § 70).

the court, the time of the confirmation should revert to the time the order was issued by the clerk. This is substantially the same procedure which is now used in the ex parte form of probate in West Virginia.

At the time the will is probated, the court or the clerk of the court should appoint three disinterested appraisers to appraise the estate. However, if the court or the clerk of the court is assured that the estate is composed solely of personal assets of definitely liquidated values or of property of negligible value, it should have the discretion of accepting the verified appraisal of the personal representative in lieu of an appraisal by appraisers.¹⁶¹

Will Contests

If notice of the petition for the probate of a will is given, any interested person should file his objection before the hearings and no further notice should be necessary unless ordered by the court. No further right of contest should exist unless the only service of notice to an interested party was by order of publication, or another will of the decedent has been discovered. In either case the right of contest should exist only until final distribution of the estate has been decreed. Under the present law in West Virginia, one who is not served with process in West Virginia and does not appear in the case may at anytime within two years or within eight months after he is served with a copy of the order, whichever is shorter, file a petition to have the proceedings reheard.¹⁶² The two-year period is too long and is unfair to the distributees of an estate. As long as service is by registered mail with a return receipt, no distinction should be made between residents and non-residents. When notice is by order of publication only, a longer period should exist to protect unaware interested parties, but the right should not extend past the time that final distribution is decreed by the court.

When notice is given after the probate of a will, interested parties should have the right of contest for a reasonable time after probate. West Virginia now permits an eight-month appeal period to the circuit court, with a trial de novo from the date of the order of the county court admitting a will to probate. Any interested person should know immediately if he desires to contest a will. A right of

¹⁶¹ *Id.* at 130 (MODEL PROBATE CODE § 120(c)).

¹⁶² W. VA. CODE ch. 56, art. 3, § 26 (Michie 1961).

contest for a four-month period from the date of the first publication of the notice of the appointment of the personal representative and the probate of the will would work a hardship on no one and would speed up the administration of such estates. For those served with notices only by order of publication, the right of contest should not exceed the date of the decree for final distribution of the estate.

The same rules as to will contests should also apply to those under a legal disability, such as minors and incompetents. They should not be given the right to contest a will after their disability ceases, if the normal time for contest has elapsed. The courts are required to appoint guardians *ad litem* for them to defend their interests.¹⁶³ As long as they are adequately protected, the distributees of an estate should not be penalized by giving them a right of contest that could exist for years.

The hearings on a will contest should be before the probate judge or the circuit judge, as the case may be. The right to a trial by a jury in a will contest is not a constitutional right, but a right given by statute.¹⁶⁴ The vast majority of the states permits a trial by jury in such cases, but the trend is not to require a jury trial as a matter of right. The issues of fact in will contests are most often of a sort which could better be dealt with by a judge than by a jury.¹⁶⁵ Consideration should be given to eliminating the right of a jury trial in such cases, and to giving the judge the discretion of using a jury if he deems such to be desirable for the individual cases involved.

Inventory and Claims

The personal representative should be required to file an inventory of the estate with the court within two months after his qualification, unless the court grants a longer time.¹⁶⁶ This is the same time required in West Virginia at the present time.

Claims against the estate of the decedent should be filed with the court within four months after the date of the first published notice to creditors. The notice to creditors should be included in the notices published either before the hearing on the petition for

¹⁶³ W. VA. CODE ch. 56, art. 4, § 10 (Michie 1961).

¹⁶⁴ W. VA. CODE ch. 41, art. 5, § 8 (Michie 1961).

¹⁶⁵ SIMES & BASYE, *op. cit. supra* note 130, at 750.

¹⁶⁶ SIMES & BASYE, *op. cit. supra* note 130, at 129 (MODEL PROBATE CODE § 120).

probate and/or the appointment of the personal representative or in the notices published after a will has been probated and/or a personal representative has been appointed, whichever is applicable. This will save the expense of two different published notices. The four-month period for filing claims is presently being used in West Virginia and is adequate. The claims should follow the same form now required to be filed before commissioners of accounts in West Virginia.

The claims that should be required to be filed are all the claims against a decedent's estate, other than expenses of administration, claims of the United States, and claims of West Virginia for inheritance taxes and property taxes, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise. If the claims are not filed within the four-month period, they should be forever barred against the estate, the personal representative, the heirs, devisees, and legatees of the decedent.¹⁶⁷ At the end of the four-month period the clerk of the court should mail notices to all parties interested in the estate that claims have been filed with the court and that they have ten days to take exception thereto. If exceptions are not filed within the ten-day period, the court should approve the claims, if they have been properly filed and are not barred by the statute of limitations. The hearings on any claims excepted to should be before the judge without a jury on or before a date designated by him after giving reasonable notice of the time and place to the claimant, the party objecting, and the personal representative. Upon the adjudication of any claims, the court should allow it in whole or in part or disallow it.

In lieu of filing his claims against the estate, the creditor should be permitted to bring suit against the personal representative for any debts or other liabilities of the decedent in excess of fifty dollars.¹⁶⁸ This would conform to the present Constitution of West Virginia and would preserve the right of a creditor to a trial before a jury. However, such a suit should be instituted within the four-month period for filing claims, or be forever barred. The commencement of the suit would serve as a claim filed against the estate and would be heard by the court, following the procedures now used by the circuit courts for similar suits. If the estate is under the

¹⁶⁷ *Id.* at 141 (MODEL PROBATE CODE § 135).

¹⁶⁸ *Id.* at 143 (MODEL PROBATE CODE § 136).

jurisdiction of a probate court, which is a branch of the circuit court, such suits should be instituted in the branch, and the probate judge should have the authority to call a jury, if demanded by any of the parties to the suit, or, if in his opinion, a jury would be desirable.

Immediately after the claims have been approved by the court, they should be payable by the personal representative. If it appears that there are not sufficient assets in the estate to pay all claims, the personal representative should report that fact to the court and apply for any order he deems necessary in connection therewith.¹⁶⁹ The creditor should be allowed legal interest on the amount due him by the personal representative from the date the claim becomes payable. This will insure prompt payment of claims.

Creditors should have no rights against the distributees or the personal representatives if they do not file their claims within the prescribed period. It may be argued that some creditors might be unaware that a debtor has died and that his rights would be jeopardized. However, "[D]eath of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim."¹⁷⁰

Contingent claims which cannot be allowed as absolute debts should, nevertheless, be filed with the court and proved. If a contingent claim is allowed, the order of the allowance should state the nature of the contingency. If the claim becomes absolute before final distribution of the estate, it should be paid in the same manner as absolute claims of the same class. If the claim does not become absolute before final distribution of the estate, the court should provide for the payment of the contingent claim by any one of the following methods:

1. By agreement of the value thereof between the personal representative and the creditor and, if approved by the court, it should be allowed in the same manner as an absolute claim.

2. If the amount has not become absolute before the personal representative is able to make final distribution exclusive of the contingent claim, the court should be able to order distribution of the estate and order the personal representative to retain in his hands sufficient assets to pay the claim, if and when it should become absolute. If the claim does not become absolute within two years

¹⁶⁹ *Id.* at 152 (MODEL PROBATE CODE § 148).

¹⁷⁰ *Id.* at 141 (MODEL PROBATE CODE § 135).

after the partial distribution of the estate has been made, the court should then be able to order distribution of the remaining assets to the distributees, and the distributees should thereafter become liable to the creditor when the claim becomes absolute. When distribution is so made, the court should be able to require bond from the distributees for the satisfaction of their liability to the contingent creditor.

3. The court should be able to order final distribution of the estate as though the contingent claim does not exist, but the distributees should be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter should become absolute. If such is done, the court should be able to require the distributees to give bond for the performance of their liability to the contingent creditor up to the amount of the estate distributed.¹⁷¹

Real Estate

Only title to the personal property of the decedent should vest in the personal representative. Title to real estate should vest in the devisees and heirs of the decedent immediately upon the death of the decedent, unless it is devised to the personal representative under the terms of the will. This is the present law in West Virginia.

If the court finds that there are insufficient personal assets in the estate of the decedent to pay all claims and debts of the estate and the real estate has not been devised to the personal representative by the terms of the will and the debts and claims remain unpaid at the end of six months after the date of the first publication of notices to creditors, the court should have the authority to order the personal representative to institute suit to subject the real estate to the payment of debts and claims. Upon the filing of the petition to subject the real estate to the payment of debts and claims, proper notice should be sent to all interested parties and they should all be made parties to the suit. The suit should be brought in the circuit court or in the probate branch of the circuit court, whichever has jurisdiction over the estate. The order of the court authorizing the real estate to be sold should state whether it is to be sold at a private or public sale. If the personal representative is ordered to sell the real estate, the order should state that it is not to be sold for less than its appraised value.¹⁷² Before selling the real estate the per-

¹⁷¹ *Id.* at 146 (MODEL PROBATE CODE § 140).

¹⁷² *Id.* at 160 (MODEL PROBATE CODE § 163).

sonal representative should have it appraised by two disinterested persons appointed by the court, unless the court directs that he be permitted to use the appraisal filed with the inventory.¹⁷³ After the proceeds from the sale of the real estate are received the personal representative should apply to the court for instructions as to how they are to be applied. If contingent claims have been filed against the estate which have not become absolute at the time of the sale of the real estate, the court should be able to treat the proceeds as personal property subject to the rights of distribution of the heirs and devisees. If it is not known whether real estate need be sold in order to satisfy contingent claims, the creditors should have a lien on the real estate until such time as the contingent claim becomes absolute.

Renunciation of Will By Surviving Spouse

Under present West Virginia law a surviving spouse can renounce a will within eight months from the date it is admitted to probate. If the will is renounced, the surviving spouse will receive in lieu of the provisions of the will what he would have been entitled to if his spouse had died intestate with children surviving.¹⁷⁴ The time limitation should be decreased from eight months to one month after the expiration of the time limited for the filing of claims, unless, at the expiration of that period, litigation is pending to determine any matter of law or fact which would affect the amount of the share to be received by the surviving spouse. If such be the case, the right of the surviving spouse to make an election should not be barred until one month after the final determination of the litigation.¹⁷⁵

Suits For Will Construction And Determination Of Heirs

Such suits should be held before the circuit judge or the probate judge, as the case may be. They should follow the same procedures as are now used in West Virginia except the methods of serving notices and the rights of parties after notice is given should coincide with the methods and rights previously outlined.

Accountings And Distribution

The personal representative should be required to file his account with the court annually during the administration of the estate,

¹⁷³ *Id.* at 161 (MODEL PROBATE CODE § 164).

¹⁷⁴ W. VA. CODE ch. 42, art. 3, § 1 (Michie 1961).

¹⁷⁵ SIMES & BASYE, *op. cit. supra* note 130, at 73 (MODEL PROBATE CODE § 35).

unless the court otherwise directs. This is substantially what is now required in West Virginia. If an extension of time for filing is desired by the personal representative, he should apply to the court for permission. Many estates require the filing of a federal estate tax return which ordinarily will not be filed until the expiration of one year from the date of the death of the decedent. By giving the court the right to extend the time for filing an account, consideration could be given to the time required between the filing of the estate tax return and the audit of the return by the Internal Revenue Service and would save the estate additional expenses in many situations.

Accountings should also be made by the personal representative to the court upon the filing of a petition for final settlement, upon the revocation of his letters, upon his application to resign and before his resignation is accepted by the court, and at any other time as directed by the court.¹⁷⁶ When the accounting is filed, it should contain the same items included in settlements now filed with commissioners of accounts in West Virginia. The personal representative should file with the court receipts for disbursements made during the accounting period and the court should be able to examine the assets on hand at the end of the period, if it so desires.¹⁷⁷

At the time of filing an account, the personal representative should petition the court to settle and allow his account. The matter should be set for hearing and notice should be given to all interested parties as the court should direct.¹⁷⁸ If notice is served personally or by registered mail with a return receipt, any interested party should have at least ten days from the date he is served to file exceptions with the court. If notice is by order of publication, the parties should have thirty days from the date of the first publication to file exceptions thereto.

When the account is approved by the court, the personal representative should be relieved from all liability for the administration of the estate during the accounting period, subject to the right of appeal and the power of the court to vacate its final orders.¹⁷⁹

¹⁷⁶ *Id.* at 166 (MODEL PROBATE CODE § 174).

¹⁷⁷ *Id.* at 167 (MODEL PROBATE CODE § 175).

¹⁷⁸ *Id.* at 168 (MODEL PROBATE CODE § 177).

¹⁷⁹ *Ibid.* (MODEL PROBATE CODE § 179.)

After the expiration of the time limit for filing claims and after all debts and claims of the estate have been paid, except for contingent and unmatured claims which cannot be paid, the personal representative should, if the estate is in a condition to be closed, render his final account and at the same time petition the court to decree final distribution of the estate.¹⁸⁰ Notice should be given as is given on the petition for the filing of an annual account. In its decree for final distribution, the court should designate the persons to whom distribution is to be made and in what parts, proportions, and amounts. The decree should state that all debts and claims have been paid, unless contingent claims have not been paid. If contingent claims have not been paid, the decree should so state and should describe such claims in the decree and should state whether the distributees take subject to them.¹⁸¹ The decree of final distribution should be conclusive on all parties involved, subject only to the right of appeal and the right of the court to reopen the decree.¹⁸²

Appeals

Appeals from all orders of the circuit court are made to the supreme court by writ of error. This should also apply to appeals from all orders of a probate branch of the circuit court. At the present time appeals must be made within eight months from the date of the order of the circuit court.¹⁸³ Consideration should be given to reducing the appeal period from eight to four months where matters of probate are involved in order to speed the administration of decedents' estates.

SMALL ESTATES

Many small estates should not have to bear the expense that must be incurred during administration. If the ordinary expenses of administration are incurred, the distributees who may be in dire need of funds in order to survive, could be caused to suffer and the amounts collectible by creditors may be decreased. A method should exist to protect such distributees and creditors. Under the present West Virginia law, when the total value of the estate does not exceed 1,000 dollars, the estate does not have to be referred to a commissioner of accounts and certain notices are dispensed with, thus decreasing the costs of administration.¹⁸⁴

¹⁸⁰ *Id.* at 170 (MODEL PROBATE CODE § 183(a)).

¹⁸¹ *Id.* at 171 (MODEL PROBATE CODE § 183(a)).

¹⁸² *Id.* at 172 (MODEL PROBATE CODE § 183).

¹⁸³ W. VA. CODE ch. 58, art. 5, § 4 (Michie 1961).

¹⁸⁴ W. VA. CODE ch. 42, art. 2, § 1 (Michie 1961).

Generally two methods are used in the United States for small estates. Either administration is dispensed with or if a personal representative has been appointed, he may be provided with a short procedure for settling the estate after the court determines that the estate is of such a size to warrant a short and inexpensive administration.

Dispensing With Administration

When the sole heirs and beneficiaries of an estate are the surviving spouse and/or the minor children of the decedent and the total value of the estate does not exceed five thousand dollars, the court should have the authority to have administration of the estate dispensed with. A petition should be filed with the court which should include the names of the heirs and beneficiaries, a list of the creditors of the estate together with the amounts of the claims so far as they are known, and a description of all real and personal property belonging to the estate, together with the estimated value thereof according to the best knowledge and information of the petitioner, and the liens and encumbrances thereon,¹⁶⁵ with a prayer that the court dispense with administration. Upon the hearing of the petition, if the court finds that the facts contained therein are true and that the claims and expenses have been paid, the court should order that administration be dispensed with and that the remaining property be turned over to the surviving spouse or to the minor children, if they be entitled thereto. If there is a will the court should order that it be probated at that time without requiring notice.

Short Administration

After the appraisalment has been filed by a personal representative and the four-month period for the filing of claims has elapsed, the court upon finding that the estate is insufficient to satisfy all debts and claims should be given the authority to order the personal representative to pay the same in the order and proportions provided and to present his account with an application for the settlement and allowance thereof. Thereupon the court, with or without notice, should adjust, correct, settle, allow or disallow such account, and if the account is settled and allowed, decree final distribution and discharge the personal representative.¹⁶⁶

¹⁶⁵ *Op. cit. supra* note 130, at 109.

¹⁶⁶ *Id.* at 111 (MODEL PROBATE CODE § 92).

SUMMARY AND CONCLUSIONS

The county court in West Virginia is not qualified to have jurisdiction over probate matters. The members of county courts in almost all instances have little or no knowledge of probate law. They are primarily concerned with the fiscal matters of the county and probate matters are of secondary importance to them. The scheme of using commissioners of accounts when any contentious issue arises in the probate of a will and the administration of an estate was devised because of the incompetency of the members of the county courts in legal matters and their lack of time to properly handle such matters.

While the vast majority of commissioners of accounts are attorneys, politics and not ability is often used by the county courts as a criterion for their appointment. The fees charged by commissioners of accounts vary from county to county and are often based upon the size of the estate, rather than the amount of work involved. Many commissioners do not perform their duties, as outlined in the statutes, either through negligence or because they feel that certain duties are unnecessary.

The circuit courts have assumed much of the responsibility in probate matters because the county courts are inferior tribunals and have no jurisdiction in matters of equity. The circuit court has concurrent jurisdiction with the county court over certain probate matters and sole jurisdiction over others. Confusion often exists as to which court actually has jurisdiction.

When there is a contentious issue which has been resolved by a commissioner of accounts, it is subject to review by too many tribunals, namely, the county court, the circuit court, and the supreme court. When a will is contested before the county court the order of the county court is appealable to the circuit court with a trial *de novo*. This can cause much duplication of effort between the two courts and additional time and expense to the estates.

Most of the major criticisms of the West Virginia probate system can be rectified by taking probate jurisdiction from the county courts and by giving the circuit courts jurisdiction over all probate matters and by eliminating the office of commissioner of accounts. In the large counties a separate court could be given such jurisdiction but such a court should be a branch of the circuit court. The

circuit clerks can be given authority to handle most of the non-contentious matters now performed by commissioners of accounts while the other matters should be heard and resolved by the judge.

While changing probate jurisdiction from the county court to the circuit court would eliminate most of the major criticisms, other criticisms can be eliminated by changing the procedures to be used in the probate of wills, the qualification of personal representatives, and the administration of estates. This study has suggested changes in many of the procedures now used which should eliminate much confusion, save the estates expense, hasten distribution, and protect beneficiaries.

This study did not cover the problems involved in guardianships, committeeships, curatorships, and testamentary trusts, but their problems are often similar to the problems confronted in a study of a probate system and any jurisdictional and procedural changes recommended should apply to them, where applicable.